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## Prevailing Defendant's Right to Recover Attorney's Fees in an Action Under Title VII of the Civil Rights Act of 1964: *Christianburg Garment Co. v. Equal Employment Opportunity Commission*

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## **Abstract**

Rosa Helm, a female employee at the Christianburg Garment Company, filed a Title VII action' against her employer, charging racial discrimination.

**KEYWORDS:** right, recover, civil

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Rosa Helm, a female employee at the Christianburg Garment Company, filed a Title VII action<sup>1</sup> against her employer, charging racial discrimination. The charge was filed with the Equal Employment Opportunity Commission and, in 1970, the Commission notified her that its efforts at conciliation had failed, and that she had a right to sue her employer on her own behalf. She did not do so. In 1972, almost two years after the Commission notified Rosa of her right to sue, Congress amended Title VII<sup>2</sup> and authorized the Commission to bring prompt judicial action on its own behalf, whenever it appears necessary, to carry out the purposes of the Act.<sup>3</sup> The Act, as amended, was to apply to all "charges pending with the Commission"<sup>4</sup> on the effective date of the amendments.

As a result, the Commission filed a lawsuit<sup>5</sup> against Christianburg Garment Company, Rosa's employer, alleging that it had engaged in unlawful employment practices in violation of the Civil Rights Act of

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1. Civil Rights Act of 1964, 42 U.S.C. § 2000e-5, Unlawful Employment Practices - Employer Practices

(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin.

2. Pub. L. 92-261, 86 Stat. 103 (March 24, 1972). The amendment gives the Commission the power to bring civil actions against an employer where the Commission is unable to secure a conciliation agreement from the employer to refrain from further unlawful employment practices and to obtain voluntary compliance with the Act.

3. 42 U.S.C. § 2000e-5(f)(2).

4. Section 14 of Pub. L. 92-261 provides that: "The amendments made by this Act to Section 706 of the Civil Rights Act of 1964 . . . shall be applicable with respect to charges pending with the Commission on the date of the enactment of this Act . . . and all charges filed thereafter."

5. *Equal Employment Opportunity Commission v. Christianburg Garment Co., Inc.*, 376 F. Supp. 1067 (W.D. Va. 1974).

1964.<sup>6</sup> The employer moved for summary judgment on the grounds that Rosa Helm's charge was not "pending" on the effective date of the amendments. The Commission contended "that charges as to which no private suit had been brought as of the effective date of the amendments remained 'pending' before the Commission so long as the complaint had not been dismissed and the dispute had not been resolved through conciliation."<sup>7</sup> The Virginia District Court<sup>8</sup> granted summary judgment on behalf of the employer, concluding that:

[W]hen Rosa Helm was notified in 1970 that conciliation had failed and that she had a right to sue the company, the Commission had no further action legally open to it, and its authority over the case terminated on that date. Section 14's reference to "pending" cases was held "to be limited to charges still in the process of negotiation and conciliation" on the effective date of the 1972 Amendments.<sup>9</sup>

The garment company, as the prevailing party, then petitioned the court for an award of attorney's fees against the Commission, as provided for in Section 706(k) of Title VII.<sup>10</sup> The Virginia District Court, finding that "the Commission's action in bringing the suit cannot be characterized as unreasonable and meritless,"<sup>11</sup> refused to grant attorney's fees. The Fourth Circuit Court of Appeals affirmed<sup>12</sup> and certiorari was granted<sup>13</sup> by the Supreme Court. The United States Supreme Court, in an opinion<sup>14</sup> expressing the unanimous view of the eight<sup>15</sup> participating Justices, affirmed the court of appeals' decision denying attorney's fees to the defendant and HELD: (1) a district court can, in its discretion, award attorney's fees to a prevailing defendant pursuant

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6. *Supra* note 1.

7. *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 414-15 (1978).

8. 376 F. Supp. 1067.

9. 434 U.S. at 415, n. 3.

10. 42 U.S.C. § 2000 e-5(k):

In any action or proceeding under this subchapter, the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, reasonable attorney's fee as a part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

11. 434 U.S. at 415.

12. 550 F. 2d 949 (4th Cir. 1977).

13. 432 U.S. 905 (1977).

14. 434 U.S. 412.

15. Justice Blackmun took no part in the consideration or decision of this case.

to Section 706(k), but only upon a finding that the plaintiff's action was "frivolous, unreasonable or groundless, or that the plaintiff continued to litigate after it clearly became so,"<sup>16</sup> (2) the district court exercised its discretion squarely within the permissible bounds of Section 706(k) in declining to award attorney's fees to the employer as a prevailing defendant;<sup>17</sup> and (3) the Commission's action against the employer based on its interpretation of Section 14 of Title VII was not frivolous, unreasonable or groundless.<sup>18</sup>

In the United States, prevailing litigants are generally not entitled to collect a reasonable attorney's fee from the losing party.<sup>19</sup> This "American Rule," as it has been referred to,<sup>20</sup> has been much criticized and is a departure from the practice followed in England.<sup>21</sup> There has

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16. 434 U.S. at 422.

17. *Id.* at 424.

18. *Id.*

19. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975). (*Alyeska* expressly reaffirmed the American Rule, although certain exceptions were recognized).

20. See 6 MOORE'S FEDERAL PRACTICE § 54.77(2) at 1703; *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *United States Steel Corp. v. United States*, 519 F. 2d 359 (3rd Cir. 1975).

21. The English have been awarding attorney's fees as costs since 1275. See Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. 75 (1963), for an article in which the author argues in favor of adopting a system like that of the English in which attorneys' fees would be considered costs of litigation. It is his feeling that a great deal of the congestion in our courts is due to the present system in which it is financially advantageous to go to court. A plaintiff may have a groundless claim, but may realize financial advantage by going to court because the defendant will often settle immediately for an amount that is less than the expenses of contesting the case. A defendant may also realize an economic advantage by continuing the litigation, even after realizing that he has no defense, or after judgment against him, to increase the plaintiff's attorney's fees and hope to get the plaintiff to settle for less than the true value of the case. In essence, the author feels that the present system represents an expense to one litigant that results in economic advantage to the other. See also Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 VAND. L. REV. 1216 (1967) in which the author analyzes the historical reasons and philosophical basis for the evolution of the "American Rule." The author believes that access to the courts without fear of having to pay an opponent's fees is so deeply ingrained in our system that it is often claimed that due process considerations demand retention of the American system despite the many arguments and movements in favor of reform. The reform movement is viewed as an outgrowth of a shift in emphasis from individualism to the importance of society as a whole. At the heart of the reform movement lie two fundamental concepts: the idea of resolving disputes by settlement and compromise rather than through litigation, and the idea that justice demands that the aggrieved party be made whole and that, to do so, attorney's fees must be included as damages.

been no adequate historical explanation for the departure from the English Rule.<sup>22</sup> It is interesting to note that, in early Colonial America, most courts adopted the English Rule and costs and fees were awarded to prevailing parties in actions at law.<sup>23</sup> However, the underlying philosophy was not that of full compensation for the wronged party, and a ceiling was put on the amount of fees which could be awarded. That ceiling was never raised to reflect increased costs. In addition, new states joining the Union rarely provided for attorney's fees to be taxed as costs and, if they did so provide, the award was merely perfunctory. Some commentators have concluded that "it was this process of gradual forgetting rather than a deep-seated moral argument that has apparently caused the abolition of the prevailing party's right to the recovery of his counsel fees."<sup>24</sup> Others have suggested that, because the new government had to create a willingness in its citizens to submit to the judicial system to resolve their disputes, there was a conscious effort on the part of the new government not to create any deterrents to the use of the courts, but to insure free access to them.<sup>25</sup>

Another reason often cited for the historical evolution of the American Rule is the spirit of individualism which permeated early American life. As a consequence of this philosophical outlook, it was only natural that parties involved in legal disputes would resolve the issues among themselves. Theoretically, our system established a set of laws and procedures whereby every person would be able to represent himself adequately without the need for an attorney.<sup>26</sup> Hence, the feeling arose that attorneys were "considered a luxury, rather than a necessity, [and] one who wished to utilize their services should not be compensated for this indiscretion."<sup>27</sup> Further,

the assertion of individual rights was so important to the early American that litigation flourished and was encouraged under "[w]hat Dean Wigmore has called the sporting theory of justice, the idea that judicial administration of justice is a game to be played to the bitter end." Inherent

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22. Dawson, *Lawyers and Involuntary Clients: Attorney's Fees from Funds*, 87 HARV. L. REV. 1597, 1598 (1974).

23. Note, *Attorney's Fees: Where shall the Ultimate Burden Lie?* 20 VAND. L. REV. at 1218.

24. *Id.* at 1219, n. 17.

25. Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?* 49 IOWA L. REV. at 81.

26. *Id.*

27. *Id.*

in the rules of this "sport" is the idea from which our rule on fees developed, that is, the idea that each individual must bear whatever burdens, including all costs, litigation might cause.<sup>28</sup>

However, despite the general rule that attorney's fees are not taxed as costs, Congress has provided limited exceptions and has made specific provisions for attorney's fees under certain federal statutes. These statutory allowances can best be categorized in the following ways: (1) those which make fee awards *mandatory* for *prevailing plaintiffs*;<sup>29</sup> (2) those which *permit* fee awards to *prevailing plaintiffs*<sup>30</sup> and (3) those which are most flexible and leave it to the *discretion* of the court to award attorney's fees to *either plaintiffs or defendants*.<sup>31</sup> Section 706(k) of Title VII of the Civil Rights Act of 1964 falls into the category which allows the district court to exercise its discretion in awarding attorney's fees to the prevailing party.

The Supreme Court, in arriving at a decision in *Christianburg*, reviewed cases arising under the third category of statutes which allow for awards of attorney's fees at the court's discretion. In rendering its decision, the Court considered *Newman v. Piggie Park Enterprises*.<sup>32</sup>

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28. Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?* 20 VAND. L. REV. at 1220-21.

29. "See, e.g., The Clayton Act, 15 U.S.C. § 15; the Fair Labor Standards Act of 1938, 29 U.S.C. § 216(b); Packers and Stockyards Act, 7 U.S.C. § 210(f); the Truth in Lending Act, 15 U.S.C. § 1640(a); and the Merchant Marines Act of 1936, 46 U.S.C. § 1227." 434 U.S. at 415, n. 5.

30. "See, e.g., the Privacy Act of 1974, 5 U.S.C. § 552(a)(g)(2)(B); Fair Housing Act of 1968, 42 U.S.C. § 3612(c)." 434 U.S. at 416, n. 6.

31. "See, e.g., Trust Indenture Act of 1939, 15 U.S.C. § 7700(d); Securities Exchange Act of 1934, 15 U.S.C. §§ 78i(e) and 78r(a); Federal Water Pollution Prevention and Control Act of 1972, 33 U.S.C. § 1365(d); Clean Air Act Amendments of 1970, 42 U.S.C. § 1857h-2(d); Waste Control Act of 1972, 42 U.S.C. § 4911(d)." 434 U.S. at 416, n. 7.

32. 390 U.S. 400 (1968). *Piggie Park* involved a class action brought under the Public Accommodations portion of the 1964 Civil Rights Act, to enjoin racial discrimination at the defendant's drive-in restaurant and sandwich shop. The appellate court found that the defendant had discriminated against Blacks at its shops. The issue before the Supreme Court was whether or not the prevailing party was entitled to attorney's fees under the applicable portions of the statute. (See note 33 *infra*). The Supreme Court, in a frequently quoted opinion, found that the plaintiff was entitled to attorney's fees under the statute and that prevailing plaintiffs would usually be entitled to attorney's fees unless there were exceptional circumstances which would render such an award unjust. The Court based its decision on the theory that plaintiffs act in the shoes of the government and often receive no monetary award for bringing such actions. They are therefore entitled to be made whole. *Id.* at 402.

which involved a statute almost identical to the one at issue in this case.<sup>33</sup> In *Piggie Park*, the plaintiffs brought an action under Title II of the Civil Rights Act of 1964.<sup>34</sup> The plaintiffs prevailed and the United States Court of Appeals instructed the district court to award them attorney's fees "only to the extent that respondents' defenses had been advanced for purposes of delay and not in good faith."<sup>35</sup> The Supreme Court in *Piggie Park* held, however, that a prevailing plaintiff under this statute

should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust . . . [because] . . . when a plaintiff brings an action under that Title he cannot recover damages. If he obtains an injunction, he does so not for himself alone but also as a "private attorney general" vindicating a policy that Congress considered of the highest priority.<sup>36</sup>

The Court also noted in *Piggie Park* that, if the intent of Congress was only to allow prevailing plaintiffs to recover an award for attorney's fees against a defendant who had acted in bad faith and made completely groundless contentions for purposes of delay, it would not have been necessary to create a new statutory provision because, under certain judicially created exceptions, "it has long been held that a federal court may award counsel fees to a successful plaintiff where a defense has been maintained 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'"<sup>37</sup> In light of the fact that no statute was necessary to award attorney's fees to the prevailing plaintiff when the defendant's behavior created a valid exceptional circumstance, the Court in *Piggie Park* concluded that the statute was necessary to insure that a prevailing plaintiff

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33. 42 U.S.C. § 2000a-3(b): "In any action commenced pursuant to this subchapter, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person."

34. 42 U.S.C. § 2000a, *et. seq.* This Act provides that "all persons shall be entitled to full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."

The Act further allows for the bringing of a civil action for injunctive relief where a party believes that someone is about to engage or has engaged in unlawful practices pursuant to this Act.

35. 390 U.S. at 401.

36. *Id.* at 402.

37. *Id.* at 402, n. 4.



in a Title II action would, as a matter of course, be awarded a reasonable attorney's fee, unless to do so would be unjust.<sup>38</sup>

In a subsequent case also cited in *Christianburg, Albemarle Paper Co. v. Moody*,<sup>39</sup> the Court made it clear that the standard enunciated in *Piggie Park* for awarding attorney's fees to a prevailing plaintiff was equally applicable to an action under Title VII of the Civil Rights Act.<sup>40</sup> Hence, it was established that, in actions arising under the category of statutes which allow the district court to exercise discretion in awarding attorney's fees to the prevailing party, the prevailing plaintiff should ordinarily be awarded attorney's fees in all but special circumstances.

The principal case presented the Court with the question of what standard should be applied in determining whether a successful defendant in a Title VII action should be awarded attorney's fees. The garment company, employer/defendant, contended that the same standards which are applied to a prevailing plaintiff should equally apply to a prevailing defendant. In other words, the garment company espoused the theory that, barring circumstances which would make an award unjust, prevailing defendants should receive attorney's fees as a matter of course.<sup>41</sup> On the other hand, the Commission/plaintiff argued

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38. *Id.* at 402. See also *Chastang v. Flynn & Emrich Co.*, 541 F.2d 1040, 1045 (4th Cir. 1976), for an example of a situation where the court found special circumstances which would support a denial of attorney's fees to the prevailing plaintiffs. Retired male employees filed a lawsuit alleging sex discrimination in a retirement plan which gave male retirees a smaller share of the retirement fund than similarly situated female employees. The district court found the plan discriminatory but refused to award attorney's fees to the plaintiffs. The Fourth Circuit Court of Appeals upheld the denial of attorney's fees on the ground that the employer acted with reasonable speed to redress its unintentional violation of the Act, once the violation became known, by amending the plan to eliminate its illegally discriminatory aspects *before plaintiffs' suits were filed*.

39. 422 U.S. 405 (1975). In this case, a certified class of present and former Black employees brought an action against their employer and the employees' union, seeking injunctive relief against any acts at the plant which violated Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972. The petitioners had argued that they were entitled to back pay, but the district court, relying on *Piggie Park*, declined to grant it on the ground that there was no evidence of bad faith non-compliance with the Act. The Supreme Court, however, refused to apply *Piggie Park* to an award of back pay, stating, "[t]here is, of course, an equally strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices. But this interest can be vindicated by applying the *Piggie Park* standard to the attorney's fees provision of Title VII, 42 U.S.C. Section 2000e-5(k)." *Id.* at 415.

40. *Id.*

41. See *Equal Employment Opportunity Commission v. Bailey Co., Inc.*, 563 F.2d 439 (6th Cir. 1977); *United States v. Allegheny Ludlum Industries, Inc.*, 558 F.2d 742 (5th Cir. 1977) for examples of federal courts which have expressed the same view as the defendant company/employer in this case.

that prevailing defendants should receive an award of attorney's fees only if the plaintiff acted in bad faith. The Supreme Court did not agree with either position. The Court indicated that the language of the statute is permissive and discretionary and neither invites, nor requires, the mechanical application which the defendant garment company sought to impose. The Court, relying once again on its decision in *Piggie Park*, pointed out that there are equitable considerations which favor an award of attorney's fees to a prevailing plaintiff which do not apply to a prevailing defendant. In distinguishing the equities involved, the Court noted that the plaintiff is viewed as the chosen "instrument of Congress to vindicate 'a policy that Congress considered of the highest priority'"<sup>42</sup> and that, when an award for attorney's fees is given in a Title VII action to a prevailing plaintiff, it is awarded against a violator of federal law.<sup>43</sup>

The Court found that the legislative debate indicated that the public policy behind allowing an award of attorney's fees is to facilitate the bringing of meritorious suits.<sup>44</sup> Reasonable attorney's fees are frequently awarded to private litigants to encourage compliance with the well-recognized Congressional policy of having Title VII enforced, to a large extent, by individuals acting as "private attorneys general."<sup>45</sup> Under the "private attorney general" theory, prevailing plaintiffs are viewed as having vindicated a policy that Congress considered of the highest prior-

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42. 434 U.S. at 419.

43. *Id.*

44. *Id.*

45. *Carey v. Greyhound Lines, Inc.*, 380 F. Supp. 467 (D.C. La. 1973). The plaintiff, James Carey, brought a lawsuit against the defendants, Greyhound and the local unions, alleging racial discrimination and seeking an injunction to prevent the defendants from interfering with his right to equal employment opportunity. He also sought a provision for change in the seniority system, an award for back pay and attorney's fees. The court found that the defendants had engaged in unlawful employment discrimination and required a change in the seniority system. Although it declined to grant back pay to the plaintiff, it did award attorney's fees. In justifying the award, the court stated:

Notably, the awarding of attorney's fees is not conditioned on a finding that the Title VII defendant has intentionally engaged in an unlawful employment practice. Reasonable attorney's fees are frequently awarded to private litigants in order to encourage compliance with the well recognized Congressional policy of having Title VII enforced to a large extent by individuals acting as "private attorneys general." In view of this policy of citizen enforcement, plaintiff is entitled to an award of reasonable attorney's fees . . . .

*Id.* at 474.

ity. If plaintiffs are forced to bear their attorneys' fees in every case, perhaps few aggrieved parties would be in a position to seek judicial relief.<sup>46</sup> In addition, the right of a plaintiff to recover an attorney's fee under Section 706(k) has been held not to be affected by the fact that the plaintiff instituted the action under Title VII as a "test case,"<sup>47</sup> or that the defenses presented were not entirely without merit,<sup>48</sup> or that there was no intentional violation of the Act by the defendant in that he acted in good faith reliance on, or compliance with, a state statute.<sup>49</sup>

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46. 390 U.S. at 402.

47. *Lea v. Cone Mills, Corp.*, 438 F. 2d 86 (4th Cir. 1971). In this case, the Black female plaintiff sued under Title VII, alleging that the defendant, Cone Mills Corporation, had failed to hire Black females, although it hired Black males and white females. The plaintiffs prevailed on the merits and obtained an injunction against the unfair practices, thus opening the way for employment of Black women in defendant's plant. The appellate court awarded attorney's fees to the plaintiffs and, in so doing, stated:

Plaintiffs prevailed on the merits. They not only obtained an injunction against unfair employment practices but also opened the way for employment of Negro women in the Cone Mills plant. True, specific employment was not sought, and even if the application was solely a predicate for this suit, these facts ought not defeat the claim for attorney's fees. This pronouncement upon their rights, and the requirement of Cone Mills to observe them in the future, were ordered in implementation of the Equal Employment Opportunities Act. Plaintiffs should not be denied attorney's fees merely because theirs was a "test case."

*Id.* at 88.

48. *Robinson v. Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971). In this case, the district court found that the defendant's seniority system violated the Equal Employment Opportunities Act but declined to award attorney's fees to the prevailing plaintiffs. The defendants had claimed that they were justified in discriminating because of an overriding legitimate purpose in maintaining the racially discriminating practice. The district court, in denying plaintiffs an award of attorney's fees, stated: "While more meritorious defenses have in some cases been presented, the defenses here cannot be fairly characterized as extreme. Therefore, the Court declines to award counsel fees as part of the costs for the plaintiffs." *Id.* at 804. *See also* 319 F. Supp. 835, 843 (M.D.N.C. 1971).

The plaintiffs appealed the denial of attorney's fees. The appellate court reversed and awarded attorney's fees, noting that: "[A]ttorney's fees are to be imposed not only to penalize defendants for pursuing frivolous arguments, but to encourage individuals to vindicate the strongly expressed Congressional policy against racial discrimination." 444 F. 2d at 804.

49. *LeBlanc v. Southern Bell Tel. and Tel. Co.*, 333 F. Supp. 602 (E.D. La. 1971). The defendant telephone company, pursuant to a Louisiana statute, refused to allow female employees to work more than eight hours per day or forty-eight hours per week. An action was brought against the telephone company by female employees charging unlawful discrimination in employment. The district court held that the Louisiana statute had been preempted by the Civil Rights Act of 1964 and, therefore, the plaintiffs

The Supreme Court, as indicated above, did not find merit in the viewpoint of the Commission that a prevailing defendant could recover attorney's fees only if the plaintiff had acted in bad faith. Instead, the Court recognized that Congress "also wanted to protect defendants from burdensome litigation having no legal or factual basis"<sup>50</sup> and intended to award attorney's fees to help defendants defend against frivolous and factually baseless actions.<sup>51</sup> A defendant seeking attorney's fees relies on equitable considerations other than the plaintiff's "private attorney general" theory. An award for the defendant is conditioned upon such considerations as the propriety of the plaintiff's conduct and whether there was vexatiousness, bad faith, abusive conduct or an attempt on the part of the plaintiff to harass or embarrass the defendant.<sup>52</sup>

prevailed and were awarded attorney's fees. On appeal, defendants argued that they had relied in good faith upon the state statute and should not be held liable for a failure to predict that the statute would be deemed unconstitutional. The appellate court upheld the award of attorney's fees and stated:

There is no requirement that the prevailing party be the victim of intentional discrimination. The courts have uniformly awarded attorney's fees in these cases even where the prevailing party was unable to recover back pay or other damages because the defendant was relying in good faith on a state statute . . . This is a recognition of the Congressional purpose to have Title VII enforced in large part by the individuals wronged acting as private attorneys general . . . Awarding attorney's fees to the prevailing party is one way of insuring that this Congressional intent will be effectuated and that individuals will not be deterred from bringing Title VII suits. These plaintiffs have been the victims of an unlawful employment practice, it is only fair that they be allowed to recover the considerable sums they have expended to vindicate not only their rights but also the rights of many other working women.

*Id.* at 611.

50. 434 U.S. at 420.

51. See *Lee v. Chesapeake & O.R. Co.*, 389 F. Supp. 84 (D. Md. 1975). An employee brought suit against the railroad company and a local labor union under the equal employment provision of the Civil Rights Act of 1964. The plaintiff admitted that he had no reasonable grounds to believe that the union had discriminated against him because of his race. Having prevailed on motions for summary judgment, the defendant union sought attorney's fees. The court, in granting them, quoted from *Paddison v. Fidelity Bank*, 60 F.R.D. 695, 699 (E.D. Pa. 1973):

While a defendant does not act as a "private attorney general" in a Title VII action, . . . a prevailing defendant is entitled to recover reasonable attorney's fees under 42 U.S.C. § 2000e-5(k) when required to defend against a frivolous or factually baseless action brought under Title VII . . . "[s]uch an award [of attorney's fees] would normally be made to prevailing defendants only if the case had been unreasonably brought . . . .

389 F. Supp. at 85.

52. See, e.g., *Robinson v. KMOX-TV, CBS Television Station*, 407 F. Supp.

The Court, in rendering its decision in *Christianburg*, was influenced by two recent circuit court cases. In one, *United States Steel Corporation v. United States*,<sup>53</sup> the court denied an award of attorney's fees to a successful defendant while, in the other, *Carrion v. Yeshiva University*,<sup>54</sup> the court upheld the award to a successful defendant. The significance of these cases is the court's application of the same standard in arriving at different results: that the action must have been "unreasonable, frivolous, meritless or vexatious"<sup>55</sup> and not merely brought in bad faith. To define these abstract words, the Court in *Christianburg* said:

"[m]eritless" is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and that the term "vexatious" in no way implies that the plaintiff's subjective bad faith is a necessary prerequisite to a fee award against him. In sum, a District Court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable or without foundation, even though not brought in subjective bad faith.<sup>56</sup>

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1272 (E.D. Mo. 1975). In this case, the defendant did everything possible to expedite the lawsuit and to cooperate with the plaintiff so that the plaintiff would have prompt adjudication of his claim. However, the plaintiff failed to pursue discovery after the defendant had voluntarily waived time limits set forth in the Federal Rules of Civil Procedure, and the suit was dismissed for plaintiff's failure to proceed. In light of the plaintiff's conduct, attorney's fees were awarded to the defendant. *See also* Matyi v. Beer Bottlers Union 1187, 392 F. Supp. 60 (E.D. Mo. 1974), where the defendant was awarded attorney's fees where, prior to the filing of the lawsuit, the plaintiff had filed charges of illegal discrimination with the National Labor Relations Board, Missouri Commission on Human Rights, and the Equal Employment Opportunities Commission, and each of these agencies had determined that the plaintiff's charges were without merit.

53. 519 F. 2d 359 (3rd Cir. 1975). The appellate court upheld the denial of attorney's fees to the prevailing defendant (U.S. Steel) in a Title VII action on the grounds that the Commission's actions were "a bona fide effort to seek information and there is nothing to indicate that the demand for access was brought to harass, embarrass or abuse either the petitioner [U.S. Steel, the defendant below] or the enforcement process, nor can we say [the E.E.O.C.'s] action was unfounded, meritless, frivolous or vexatiously brought." *Id.* at 363.

54. 535 F. 2d 722 (2nd Cir. 1976). In this case, attorney's fees were awarded to a prevailing defendant because the plaintiff had previously brought substantially similar charges in state court and, in that suit, the trial judge determined that the plaintiff had perjured herself. In addition, the court of appeals concluded that the suit was motivated by malice and vindictiveness.

55. *Id.* at 727, 519 F. 2d at 363.

56. 434 U.S. at 421.

The Court's decision sets a standard which allows for the award of attorney's fees to the defendant in a Title VII action even if the plaintiff did not act in bad faith. This would mandate the imposition of attorney's fees against the plaintiff if that plaintiff continued to litigate after it became clear that the claim was groundless, frivolous or unreasonable.<sup>57</sup> This is logically consistent with past precedent. If bad faith was the sole standard, it would not have been necessary for Congress to statutorily provide for an award of attorney's fees since the common law already provides that a prevailing party is entitled to such an award if the opposing party acts in bad faith.<sup>58</sup>

There are few areas of uncertainty left by the *Christianburg* decision. The Court has laid the foundation for an increase in the number of awards of attorney's fees to prevailing defendants by clarifying the standards for allowing their recovery and by formulating a standard which is not grounded solely on the bad faith of the plaintiff. This could, for example, provide a tremendous advantage to a small businessman/defendant with limited finances who is forced to pay a substantial cost in defending a frivolous, unreasonable and groundless lawsuit. If such a defendant is confident of his legal position, he can aggressively defend against frivolous or nuisance suits with the knowledge that, if he prevails, he will recover his attorney's fees.

By setting a reasonable standard for plaintiff's liability for defendant's legal fees in Title VII actions, the Court's decision may cause prospective litigants to stop and think before commencing an action or asserting a defense. It may thus serve as a deterrent to bringing frivolous, time-consuming litigation, and court congestion may ultimately be reduced. Perhaps the threat of having to pay the winning party's attorney's fee will even encourage out-of-court settlements and/or compliance with Title VII. However, inherent in the decision is the risk that the fear of having to pay double attorney's fees may keep meritorious litigants, especially the poor, from seeking relief through the courts.

The fact remains, though, that as a result of the *Christianburg* decision, the Supreme Court has established a double standard for the recovery of attorney's fees in Title VII actions. The Court has affirmed that it is easier for prevailing plaintiffs to recover attorney's fees than

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57. *Id.* at 422.

58. See *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399 (1923) and *Vaughn v. Atkinson*, 369 U.S. 527 (1962), for examples of cases where, in the absence of a statutory provision, the prevailing party received attorney's fees based on the fact that the opposing party had acted in bad faith.

for prevailing defendants.<sup>59</sup> The prevailing plaintiff receives the award as a matter of course (barring exceptional circumstances which would make such an award unjust), despite the fact that the defendant is able to present a meritorious, albeit unsuccessful, defense.<sup>60</sup> On the other hand, the prevailing defendant's right to an award is conditioned upon a finding that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, . . . if a plaintiff is found to have brought or continued such a claim in *bad faith*, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense."<sup>61</sup>

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59. The Supreme Court, in footnote 20 of its opinion, recognized that some courts considered that there should be a distinction between awarding attorney's fees against a losing private plaintiff and against the Commission as a losing plaintiff. However, the Court rejected this idea and indicated that the same standard should apply.

60. *Supra* note 48.

61. 434 U.S. at 422.